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No. 83-985

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

SOUTHERN PACIFIC TRANSPORTATION CO.
Appellant,

v.

PUBLIC UTILITIES COMMISSION
OF CALIFORNIA, ET AL.,
Appellees.

SOUTHERN PACIFIC TRANSPORTATION CO. ET AL.,
Appellants,

v.

PUBLIC UTILITIES COMMISSION
OF CALIFORNIA, ET AL.,
Appellees,

On Appeal from the Supreme
Court of California

REPLY BRIEF FOR APPELLANTS

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February 11, 1984

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
I. THIS COURT HAS JURISDICTION OF THESE APPEALS	2
A. The Federal Question Was Properly Presented	2
B. Appellees Have Failed to Meet the "Plain Statement" Test Recently Enunciated in <i>Michigan v. Long</i> Which Determines This Court's Jurisdiction	4
C. The 1981 Denials Did Not Create a Res Judicata Bar to These Appeals	5
D. The 1983 Denials Run To A New Cause of Action	7
II. THE QUESTION OF STAGGERS ACT PRE-EMPTION IS A SUBSTANTIAL FEDERAL QUESTION	8
Appendix	1a

TABLE OF AUTHORITIES

CASES	PAGE(S)
<i>Commissioner v. Sunnen</i> , 333 U.S. 591 (1948)	8
<i>Consumers' Lobby, Etc. v. Public Util. Com'n.</i> , 25 C.3d 891, 603 P.2d 41 (1979)	5
<i>Cromwell v. County of Sac.</i> , 94 U.S. 351 (1876)	8
<i>Dixon v. Duffy</i> , 344 U.S. 149 (1952)	5
<i>Dump Truck Owners Assn. v. Public Util. Comm.</i> , 434 U.S. 9 (1977)	7
<i>Durley v. Mayo</i> , 351 U.S. 277 (1956)	4
<i>England v. Medical Examiners</i> , 375 U.S. 411 (1964)	6
<i>Irwin v. Irwin</i> , 69 C.A.3d 317, 138 Cal.Rptr. 9 (1977)	6
<i>Kalb v. Feuerstein</i> , 308 U.S. 433 (1940)	6
<i>Michigan v. Long</i> , 51 U.S.L.W. 5231 (U.S. July 6, 1983)	4, 5
<i>Stembridge v. State of Georgia</i> , 343 U.S. 541 (1952)	4
<i>Texas v. United States</i> , No. A 80 CA 487 (W.D. Texas, filed December 12, 1980)	6
<i>Title Guarantee & Trust Co. v. Monson</i> , 11 C.2d 621 (1938) ...	6
<i>Younger v. Jensen</i> , 26 C.3d 397, 605 P.2d 813 (1980)	8

ADMINISTRATIVE DECISIONS AND ORDERS

INTERSTATE COMMERCE COMMISSION

Ex Parte No. 388, State Intrastate Rail Rate Authority—P.L. 96-448, Order, 365 ICC 700 (May 4, 1972), 47 Fed.Reg. 20220 (May 11, 1982)	8, 9
Suspension Case No. 70952, California Special Train Service, Southern Pacific, Notice (December 1, 1982)	9
Finance Docket 30123, Southern Pacific Transportation Company Discontinuance of Passenger Train Service in Ventura and Los Angeles Counties, CA, Decision (Decem- ber 2, 1983) (unprinted)	9

STATUTES

FEDERAL

Interstate Commerce Act, including the Staggers Rail Act of 1980, P.L. 96-448, 94 Stat. 1895	
49 U.S.C. § 10501(c)	7
49 U.S.C. § 11501(b)(3)(A)	7, 10
49 U.S.C. § 11501(b)(4)(A)	7, 10
49 U.S.C. § 11501(b)(4)(B)	7

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REPLY BRIEF FOR APPELLANTS

In these consolidated appeals, SP contends that two 1983 decisions of the California supreme court denying review of orders of the California Public Utilities Commission ("the 1983 Denials") erroneously refused to recognize that, effective May 11, 1982, California was deprived of authority by the Staggers Rail Act of 1980 to order new intrastate rail passenger services. In a related Petition for a Writ of Certiorari, No. 83-1053, SP contends that the ninth circuit's refusal to enjoin the PUC from enforcing its order of June 2, 1982 (which ordered SP to build passenger stations and file tariffs) and from taking any further steps to implement the proposed commuter service, was an erroneous application of the doctrine of *res judicata*.

Rather than meet these points directly, appellees PUC and Caltrans have argued that SP is foreclosed from raising its federal preemption arguments because SP did not seek review in this Court of two California supreme court orders of December 23, 1981, denying review of previous PUC orders ("the 1981 Denials") and have moved to dismiss the appeals ("Motions to Dismiss"). Appellees have waived any reply to SP's Petition for Certiorari.

Appellees have given no reason why this Court should not now stop California's continuing and wrongful assertion of authority expressly taken from it by the Staggers Rail Act of 1980, conduct which has deprived and will continue to deprive SP and its managing officers of rights which Congress conferred in plain and unambiguous language.

I.

THIS COURT HAS JURISDICTION OF THESE APPEALS

A. The Federal Question Was Properly Presented Below

Appellees argue that the federal question here raised was not presented below. That question in its simplest terms is whether the Interstate Commerce Commission's May 11, 1982 assumption of jurisdiction over California rail transportation pursuant to the Staggers Rail Act of 1980 stripped California of authority to order new intrastate rail passenger service. The record is clear that the federal question was raised by SP at the first opportunity and was continuously pressed by SP at every stage of this litigation.

In the first appeal, the "Service Order" case, S.F. No. 24525, SP stated its objections at the outset of the PUC hearings:

"MISS HARRIS [SP]: First of all, this is a special appearance by Southern Pacific, as we indicated in our motion seeking an evidentiary hearing in this proceeding, and also in our petition to reopen the record and set aside Decision 82 06 045 in Complaint 10575, that in making this special appearance, we are not waiving our jurisdictional and other defenses which are the subject of pending Federal Court proceedings. Specifically, Decision 82 06 045, which is the subject of the contempt complaint case

and the petition to reopen, is in our view in excess of the PUC jurisdiction. And this is because of the Staggers Act and the subsequent PUC request to the ICC to assume jurisdiction over California intrastate rail transportation and the ICC assumption of that jurisdiction on May 11, 1982.

As a result of that event, the subject matter in the PUC order on June 2 is now under the exclusive jurisdiction of the ICC, and we are continuing to press that position in our Federal Court proceedings." (Vol. 28, T. 2829, September 27, 1982; Reply App. at 1a.)¹

Caltrans acknowledged that the PUC's subject matter jurisdiction was at issue:

"MR. SOLANDER [Caltrans]: Your Honor, as I understand special appearances, it is mainly for the purpose of challenging the jurisdiction of this Commission." (Vol. 28, T. 2837-2838, September 27, 1982; Reply App. at 2a.)

Thus, SP's jurisdictional defense was squarely raised in front of the PUC in the Service Order case. SP then petitioned the California Supreme Court for review of the Service Order on the grounds that, as of May 11, 1982, the subject transportation was under the exclusive jurisdiction of the ICC. (Reply App. at 6a.)²

In SP's second appeal, the "Contempt Order" case, S.F. No. 24573, the sole issue raised by SP was federal preemption, specifically, that SP's temporary suspension of the service was pursuant to its tariff filed with the ICC in compliance with the Staggers Act, which ousted the PUC from jurisdiction over intrastate rail service. The PUC set forth SP's federal preemption arguments in its Contempt Order (Appeal App. at 148a), although it rejected SP's position. These same preemption arguments were forcefully raised in SP's petition for review (Reply App. at 15a), and are now properly before this Court.

¹ In referring to the Appendix to this Reply, "Reply App. at ____" will be used. "Appeal App. at ____" refers to the Appendix attached to SP's opening brief in No. 83-985; "Petition App. at ____" refers to the Appendix to the Petition for Certiorari in No. 83-1053.

² A second issue was whether the PUC had had eminent domain authority to order Caltrans to enter onto SP's land to build stations and relocate tracks. A decision on this issue could not have resolved the federal question presented.

B. Appellees Have Failed to Meet The "Plain Statement" Test Recently Enunciated in *Michigan v. Long* Which Determines This Court's Jurisdiction

Appellees contend that the 1983 decisions of the California supreme court denying review *might* have rested upon res judicata, a nonfederal ground, and, therefore, consistent with its practice as enunciated in *Durley v. Mayo*, 351 U.S. 277 (1956) and *Stembridge v. State of Georgia*, 343 U.S. 541 (1952), this Court should decline review. However, *Durley* and *Stembridge* were recently substantially modified by *Michigan v. Long*, 51 U.S.L.W. 5231 (U.S. July 6, 1983). In *Michigan v. Long*, the Court announced that it now will "require a clear and express statement that a decision rests on adequate and independent state grounds" before it declines jurisdiction. 51 U.S.L.W. at 5234, n. 7. This is referred to by the Court as the "plain statement" rule. *Ibid.*

The Court recognized in *Michigan v. Long* that it had over the years announced a number of varied and sometimes inconsistent principles to decide the issue of its jurisdiction from state decisions.

"[W]e openly admit that we have thus far not developed a satisfying and consistent approach for resolving this vexing issue." *Id.* at 5233.

The Court concluded, therefore, that

"it is appropriate to reexamine our treatment of this jurisdictional issue in order to achieve the consistency that is necessary." *Ibid.*

The Court determined after analysis that

"we have jurisdiction in the absence of a plain statement that the decision below rested on an adequate and independent state ground." *Id.* at 5235.

The Court specifically stated that, when presented with "ambiguous or obscure" adjudications by state courts, the Court will not be deterred from determining the validity of the state action under federal law. *Id.* at 5234. As justification for this holding, the Court observed as a practical matter that when it has vacated and continued an appeal for clarification in doubtful cases, the result has been unsatisfactory. It specifically

cited its experience in *Dixon v. Duffy*, 344 U.S. 149 (1952), where the Court was unable to secure from the California supreme court an answer as to whether the California court's summary dismissal of the appeal rested on adequate state grounds. *Id.* at 5233, n. 5. Thus, *Michigan v. Long* finds a federal basis for a challenged state decision where, as here, the federal issue was the basis of the challenge below, and the state court does not otherwise explain its result.

The two 1983 decisions at issue here, like *Dixon v. Duffy*, *supra*, were entered without opinion. Federal preemption was the basis of SP's objection to the PUC's conduct, and it provided the sole defense for Weber, McNear, and SP in the contempt proceeding. In the absence of a "plain statement" to the contrary, *Michigan v. Long* compels the conclusion that this Court has jurisdiction to hear these appeals.

C. The 1981 Denials Did Not Create A Res Judicata Bar To These Appeals

Appellees argue that SP is barred from appealing the 1983 decisions by res judicata as the result of the California supreme court's summary denials of review in 1981 of PUC decisions entered in 1980 and 1981. But, those 1981 PUC decisions placed no burden on SP, other than to negotiate. Thus, denial was appropriate because, as the California supreme court held in *Consumers' Lobby, Etc. v. Public Util. Com'n.*, 25 C.3d 891, 904, 603 P.2d 41, 48 (1979), where the injury is still speculative, an otherwise meritorious petition will be denied, without explanation, as premature.³

SP's Petition for Writ of Certiorari in No. 83-1053 ("Petition") contains multiple reasons why res judicata was erroneously applied by the district court and the ninth circuit to foreclose SP from obtaining relief from the PUC's June 2, 1982 order (Petition at 9-24). That Order, issued a month after the ICC assumed jurisdiction over intrastate rail transportation in California, forced the construction of stations and the commencement of service. Appellees elected not to reply to SP's

³ This reasoning, apt in 1981, could not apply when the PUC later forced the construction of stations and operation of trains, and was threatening to jail recalcitrant railroad executives.

petition. However, the points there stated apply with equal force to appellees' arguments that *res judicata* bars any appeal to this Court of the California supreme court's 1983 denials of review of the PUC's Service Order and Contempt Order.

As SP pointed out in its Petition, under California law *res judicata* is not applied where the basis for the previous decision is uncertain. *Title Guarantee & Trust Co. v. Monson*, 11 C.2d 621, 632 (1938), *Irwin v. Irwin*, 69 C.A.3d 317, 322, 138 Cal.Rptr. 9, 11 (1977). (Petition at 16). Since the 1981 Denials are simply one-sentence denials, with obvious alternative grounds, there is no way of knowing whether any Staggers Act issues were decided.⁴ Thus, under California law, these 1981 Denials are not *res judicata*.

Additionally, SP's Petition called attention to the fact that the California supreme court was advised that the Staggers Act issue was in litigation already in federal court in *Texas v. United States*, No. A 80 CA 487 (W.D. Texas, filed December 12, 1980), and that SP did not wish the California court to decide the issue. (Petition at 10-11). Following the logic and policy of *England v. Medical Examiners*, 375 U.S. 411 (1964), the 1981 Denials should not thus create a *res judicata* bar.⁵

Finally, SP argued that the *res judicata* doctrine must give way if its application in a particular case collides with a higher policy that flows from the Constitution itself. See, e.g., *Kalb v. Feuerstein*, 308 U.S. 433 (1940). (Petition at 17-18). Congress in the Staggers Act exercised its unquestioned power over

⁴ SP did not raise the Staggers Act preemption issue in either of the 1981 proceedings; it was initially raised by PUC and Caltrans in their Opposition (Petition App. at 74a), and SP in its Reply specifically informed the California court that it did "not believe the issue is properly before the Court at this time." (Petition App. at 91a.) SP further stated that "should the Court desire to address this important issue, it would seem appropriate that further briefing would be called for from the parties . . ." *Id.* The fact that the California court did not ask for more briefing further substantiates that the court did not decide the issue.

⁵ Appellees argue in this regard that federal preemption over passenger rail service was not decided in the *Texas* case because the distinction was not raised by California or other states (PUC Motion to Dismiss, p. 6). This is no answer, for the *Texas* court upheld the Staggers Act in its entirety, and the preemptions in it extend to all rail transportation, passenger as well as freight. California, having attacked the Staggers Act, was given an opportunity to try to carve an exception for its passenger services, but elected not to do so.

interstate commerce and determined that states should no longer be able to force railroads to engage in state-sought local services at state-dictated prices. No California supreme court action, or inaction, should be used to frustrate Congress' intent.

Appellees attempt to distinguish *Dump Truck Owners Assn. v. Public Util. Comm.*, 434 U.S. 9 (1977) by claiming that the PUC was not reconsidering the federal issue after the 1981 Denials. (PUC Motion to Dismiss at 16). What *Dump Truck* held was that if the PUC on further consideration were to decide the proceeding on *any* ground that might moot the case, this Court should not hear the matter. In 1981, when the 1981 Denials were issued, the PUC could have mooted the case if it had decided not to order the service once it was clear that Caltrans had no intention of paying revenue-adequate compensation. (Petition at 13-14)⁶.

D. The 1983 Denials Run To A New Cause Of Action

The 1983 denials in the Service Order and Contempt Order cases cannot be barred by res judicata in any event because they are based on a new cause of action which occurred after the 1981 Denials. (Petition at 23-25) Specifically, the new cause of action arose from the ICC's assumption of jurisdiction on May 11, 1982. As a consequence of the ICC's assumption of jurisdiction, all rail transportation within California was deemed to be subject to the Interstate Commerce Act (49 U.S.C. §11501(b)(4)(B)) and California expressly lost authority to issue orders requiring train service. 49 U.S.C. §10501(c).

Until January 29, 1981, California had retained jurisdiction. However, once it failed to file for certification, it lost that jurisdiction on January 29, 1981, pursuant to 49 U.S.C. §11501(b)(4)(A). During the period January 29, 1981 until May 11, 1982, when the ICC assumed jurisdiction, California intrastate rail transportation was in a non-regulated limbo; that is, not under the jurisdiction of either the ICC or the PUC.

⁶ Appellees argue, apparently seriously, that the result of *Dump Truck* is that these appeals are still not ripe for consideration because the PUC is still holding the matter open. But that is not so; the contempt convictions of SP. Weber, and McNear are final and appellants look to this Court to annul — now — those wrongful orders.

When the 1981 Denials were issued, the ICC had not yet assumed jurisdiction. When the PUC made its Service Order in October 1982, and later issued its Contempt Order, that had changed. The ICC had assumed jurisdiction, and, therefore, was the only regulatory agency with decisional power over California intrastate rail transportation. Even assuming that the 1981 California supreme court denials were a holding that California could retain jurisdiction during the regulatory limbo period (January 29, 1981 to May 10, 1982), they could not have precluded the ICC's subsequent and independent takeover of jurisdiction on May 11, 1982.

As stated in SP's Petition, this Court has held that a second suit based on a new cause of action can only be barred if the claims raised in the second suit were

"actually litigated and determined in the original action."

Cromwell v. County of Sac., 94 U.S. 351, 353 (1876).

This Court reaffirmed that principle in *Commissioner v. Sunnen*, 333 U.S. 591, 597-598, 601-602 (1948).

California has likewise held that a party can only be barred by res judicata as to issues which were actually litigated and determined in the earlier action. *Younger v. Jensen*, 26 C.3d 412-413, 605 P.2d 813, 823 (1980). Although SP firmly believes that the Staggers Act was not litigated or decided in any way, shape, or form in the California supreme court in 1981, the question as to whether California had any jurisdiction after May 11, 1982, clearly could not have been considered or decided at that time.

II.

THE QUESTION OF STAGGERS ACT PREEMPTION IS A SUBSTANTIAL FEDERAL QUESTION

At issue in these proceedings is whether California can continue to assert extrajurisdictional authority, backed by threat of its summary criminal contempt powers, over intrastate rail services and the uses which California railroads may make of their tracks and facilities and the prices they may charge.

That the ICC has asserted jurisdiction over all intrastate service, freight and passenger, is undisputed. The ICC's May 11, 1982 order in *Ex Parte 388, State Intrastate Rail Rate*

Authority—P.L. 96-448, 365 ICC 700 states: "... the Commission shall assume jurisdiction over intrastate rail transportation in [California] ..." (Appeal App. at 188a). Thereafter, the ICC expressly asserted jurisdiction over the Oxnard commuter service in accepting SP's rail passenger tariff for the Oxnard trains without suspension or investigation. Suspension Case No. 70965, California Special Train Service, Southern Pacific, Notice (December 1, 1982; Appeal App. at 192a).

The ICC's jurisdiction over the Oxnard passenger service was reaffirmed by Judge Paul Clerman for the ICC in Finance Docket 30123, *Southern Pacific Transportation Company Discontinuance of Passenger Train Service in Ventura and Los Angeles Counties, Ca* (unprinted decision served December 2, 1983; Appeal App. at 211a-212a):

"Unless it is presumed that the Congress was exceedingly careless in the drafting of section 214 of Staggers, and that the Commission has been equally careless in the implementation thereof, the conclusion is warranted in light of the foregoing that rail passenger operations are within the purview of the statute and the rulemaking proceeding. The conclusion is impelled, accordingly, that the Commission's decisions and orders in the latter proceeding, to the extent appropriate, apply as well to rail passenger operations. In other words, where the Commission in its decisions in Ex Parte No. 388 has made the finding that a State, such as California, has 'lost all jurisdiction to regulate intrastate rail transportation', that 'transportation' by statutory definition and in the absence of affirmative indication to the contrary must be taken to include also rail passenger operations."

Appellees refused to accede to the ICC's jurisdiction and contend that the ICC's order in Ex Parte 388 could not have conferred jurisdiction over California intrastate passenger service because California requested only that the ICC assume jurisdiction over intrastate *freight* rate matters. (PUC Motion to Dismiss, p. 5).

Whether the PUC's two request letters (Reply App. at 24a and 26a), ambiguous at best, should be given the interpretation urged for them by the PUC, the fact is that the ICC interpreted them as a request for full assumption of jurisdiction in Califor-

nia and entered its order accordingly. That order was not appealed by the PUC. Nor has the PUC ever filed any standards or procedures for passenger service regulation; thus, the ICC could not permit California to retain any passenger service jurisdiction. 49 U.S.C. §11501(b)(3)(A) and (4)(A).

Finally, the PUC has characterized the Oxnard service as a "dead letter" (PUC Motion to Dismiss, p. 11), but it refuses to treat it as such. The PUC has nowhere indicated that it will voluntarily desist from regulating intrastate passenger service, nor has it vacated the contempt convictions of SP, McNear and Weber or in any way demonstrated that violations of SP's Staggers Act rights will not recur. Appellees' past conduct indicate that they will not relinquish their hold on California passenger matters until told by the Court to stop.⁷

The Court should act now to stop California's efforts to place local priorities and local service demands beyond the explicit reach of the Staggers Rail Act of 1980, and should order California to forthwith stop activities which frustrate the goals and objections set forth by Congress for the railroad industry in the Staggers Act. The contempt convictions of Weber, McNear, and SP should be set aside.

DATED: February 11, 1984.

Respectfully submitted,

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⁷ The PUC's suspension order explicitly reserves jurisdiction to decide the level of public subsidy and to decide when and under what condition the service should resume. Appeal App. at 172a.

APPENDIX

**Reporters Transcript, San Francisco, CA,
September 27, 1982, Volume 28**

[Page 2829] are confident that Southern Pacific is indeed in contempt of the Commission's orders right now.

ALJ MALLORY: All right. Miss Harris, do you have an opening statement?

MISS HARRIS: Yes, I do.

STATEMENT OF MISS HARRIS

MISS HARRIS: First of all, this is a special appearance by Southern Pacific, as we indicated in our motion seeking an evidentiary hearing in this proceeding, and also in our petition to reopen the record and set aside Decision 82 06 045 in Complaint 10575, that in making this special appearance, we are not waiving our jurisdictional and other defenses which are the subject of pending Federal Court proceedings specifically Decision 82 06 045, which is the subject of the contempt complaint case, and the petition to reopen is in our view in excess of the PUC jurisdiction. And this is because of the Stagers' Act and the subsequent PUC request to the ICC to assume jurisdiction over California intrastate rail transportation and the ICC assumption of that jurisdiction on May 11, 1982.

As a result of that event, the subject matter in the PUC order on June 2 is now under the exclusive jurisdiction of the ICC, and we are continuing to press that position in our Federal Court proceedings.

Regarding the business before the Commission

* * *

[Page 2837] I assume those actions are revisions of the track and construction of station platforms and parking and lighting facilities.

MR. SOLANDER: No, your Honor.

ALJ MALLORY: I haven't read this document, so I don't know exactly what is asked.

First, I would like to have you state more specifically what actions you contemplate that SP does by October 1st, and then how you would accomplish those actions yourself within the time period between October 1 and October 18. I am assuming that. I am not familiar with what is in the document, so I am making some assumptions.

I assume that what you ask is the right to construct certain facilities yourself.

And Ms. Harris contends that what was in the original plans requires 18 months to construct.

Apparently you are going to do something in 18 days that Southern Pacific couldn't do in 18 months.

Will you explain how you would do this?

MR. SOLANDER: Certainly. Before I do that, though, your Honor, I want to respond to SP's contention that it is entitled to make a special appearance in this proceeding and—

ALJ MALLORY: I don't think that is necessary.

MR. SOLANDER: Your Honor, as I understand special appearances, it is mainly for the purpose of [Page 2838] challenging the jurisdiction of this Commission.

Now, what SP wants to do is go through an entire proceeding, bring in evidence, challenging all sorts of matters relating to issues that have been litigated before this proceeding.

I would move to strike Ms. Harris' statement except to the extent that it relates to Stagers.

I think the Commission would be offended by the actions of the Southern Pacific to sit here and request what might amount to days of hearings when it says you don't even have jurisdiction to make the order. I think that is absolutely unforgivable.

ALJ MALLORY: The purpose of these hearings is certainly not to relitigate anything that has been litigated before, including jurisdictional issues.

It's my understanding that a Federal District Court has already considered the Staggers Act pleadings of SP and denied them by its order.

Certainly you can come in on any basis you want, SP can come in on any basis it wants, but it is before the Commission, and the Commission is going to react as we have jurisdiction in this issue.

We are not going to go again into all of the jurisdictional issues.

IN THE
SUPREME COURT OF THE
STATE OF CALIFORNIA

SOUTHERN PACIFIC TRANSPORTATION
COMPANY, a corporation,

Petitioner,

v.

No. S.F. 24525

PUBLIC UTILITIES COMMISSION OF THE
STATE OF CALIFORNIA AND THE INDIVID-
UAL MEMBERS THEREOF,

Respondents;

DEPARTMENT OF TRANSPORTATION
STATE OF CALIFORNIA

Real Party in Interest.

PETITION FOR WRIT OF REVIEW
WITH
MEMORANDUM OF POINTS AND AUTHORITIES IN
SUPPORT THEREOF

TO THE HONORABLE ROSE E. BIRD, CHIEF JUSTICE,
AND TO THE HONORABLE ASSOCIATE JUSTICES
OF THE SUPREME COURT OF THE STATE OF
CALIFORNIA

Southern Pacific Transportation Company ("SP") respectfully requests this Court to inquire into and determine the lawfulness of two decisions of the Public Utilities Commission of the State of California ("Commission" or "Respondents"): Decision No. 82-10-031 dated October 6, 1982, and Decision No. 82-10-041 dated October 18, 1982, both issued in Case No. 82-08-01 upon the complaint of the Department of Transportation, State of California ("CalTrans"), the real party in interest.¹

¹ Decision No. 82-10-031 is Appendix A hereto. Decision No. 82-10-041 is Appendix B hereto.

SP seeks review of the decisions because, by them, the Commission has purported to assert authority over California intrastate rail transportation which Congress has expressly taken away, and has taken SP's property for the use and benefit of CalTrans in violation of the Federal and State Constitutions and the Eminent Domain Law of this State. As more fully described below, the issues raised by this petition have not been determined by this Court in any other proceeding.

Jurisdiction of the Court

This petition is filed pursuant to the jurisdiction of the Court to review the decisions of Respondents under §§1756-1767 of the Public Utilities Code. On October 26, 1982, SP filed its application for rehearing of Decision No. 82-10-031 and Decision No. 82-10-041.² By Decision No. 82-12-093 of December 15, 1982, the Commission denied the application.³

Grounds for Petition

SP seeks review of the cited decisions and orders of the Commission on the following grounds:

By ordering SP to operate passenger trains between Oxnard and Los Angeles, the Commission purported to exercise an authority which the Congress has expressly taken away by the enactment of the Staggers Act⁴ and the failure of the State to be certified to regulate intrastate rail transportation in accordance with federal standards. The making of such orders is in excess of the Commission's authority, contravenes the Supremacy Clause of the federal Constitution, and violates the oaths of the respondent Commissioners to uphold the Constitution of the United States.

² The application also sought rehearing of Decision No. 82-10-010. This petition does not seek review of that decision. A copy of SP's application for rehearing is Appendix C hereto.

³ A copy of Decision No. 82-12-093 is Appendix D hereto.

⁴ The Staggers Rail Act of 1980, P.L. 96-448, 94 Stat. 1895 (the "Staggers Act"), was passed by Congress October 1, 1980, was approved October 14, 1980 and was made effective as of October 1, 1980.

By granting CalTrans the right to enter and occupy SP's property for the purposes of relocating its tracks and constructing and maintaining stations and parking facilities on such property, the Commission has taken SP's property without compensation in violation of the Fifth and Fourteenth Amendments of the United States Constitution, of Article I, §19, of the California Constitution and the Eminent Domain Law of this state.

Questions Presented

The decisions and orders of the Commission of which review is sought present the following questions for review by this Court:

1. Does the Commission, on and after the assumption by the Interstate Commerce Commission of jurisdiction over California intrastate rail transportation pursuant to the Staggers Act, have jurisdiction and authority to require SP to perform rail passenger service between points in California?

2. May the Commission, consistently with the federal and state Constitutions and the Eminent Domain Law of this state, authorize CalTrans to enter and occupy SP's property, to relocate SP's tracks and to construct stations and parking facilities on such property, and require SP to make its property available to CalTrans for those purposes?

Statement of the Case

The orders of which review is sought arise out of the filing on May 18, 1978, by the County of Los Angeles and CalTrans of a complaint before the Commission in another proceeding (Case No. 10575) seeking an order directing SP to establish a commuter rail service between Oxnard and Los Angeles.⁵ By Decision No. 91847 in Case No. 10575, 3 Cal. P.U.C. 2d 679

⁵ On April 7, 1981, the motion of the County of Los Angeles to withdraw was granted by Decision No. 92862.

(1980), the Commission ordered SP to build station and parking facilities in accordance with plans and specifications to be submitted by CalTrans and to operate two week-day commuter passenger trains between Oxnard and Los Angeles. By reason of a petition for rehearing and subsequent stays of the effective date of the order in Decision No. 91847, the order to institute service contained in Decision No. 91847, as modified by subsequent decisions, was stayed until June 2, 1982, when the stay was lifted and the order to operate the commuter trains became effective for the first time (Decision No. 82-06-045).

While the foregoing proceedings in Case No. 10575 were pending, the Staggers Act was enacted effective October 1, 1980. As more particularly described below, the Commission was not certified by the ICC to regulate California intrastate rail rates (including passenger fares) in accordance with federal standards. As a consequence, on May 11, 1982, the ICC assumed exclusive jurisdiction to regulate all intrastate rail transportation within California pursuant to 49 U.S.C. §11501(b)(4).⁶ As a result of that assumption, the Commission lost its authority under the police power of the State to require the performance of intrastate rail transportation by carriers subject to the ICC's jurisdiction, such as SP, 49 U.S.C. §10501(c)(1). Therefore, when the Commission, on June 2, 1982, lifted its stay of prior orders directing the construction of station and parking facilities and the institution of the commuter service, it had lost its power to require SP to operate the trains involved.

Because SP believed this to be the case, and was challenging the Commission's June 2 order in the federal courts, SP did not commence the construction of platforms and parking facilities by June 15, 1982 as contemplated by that order.

⁶ Ex Parte No. 388, State Intrastate Rail Rate Authority—P.L. 96-448, 365 I.C.C. 700 (May 4, 1982), 47 Fed. Reg. 20220 (May 11, 1982). The text of cited sections of Title 49, United States Code, is reproduced in Appendix E.

On August 4, 1982, CalTrans filed with the Commission a complaint for an order to show cause why SP should not be found in contempt (Case No. 82-08-01). Hearings on the complaint were held on September 27 and 29, 1982. Thereafter, on October 6, 1982, the Commission issued its Decision No. 82-10-031 granting CalTrans the right to construct stations and parking facilities on SP property at Simi Valley and Panorama City and to relocate SP's track 6065 at Simi Valley, and setting a contempt hearing for 10:00 a.m. October 18, 1982.

Following weekend telephone conferences on October 16 and 17, 1982, between representatives of SP, CalTrans, the Commission staff and Commissioner Gravelle, the Commission issued its further order (Decision No. 82-10-041, October 18, 1982) directing SP to lease locomotives from Amtrak, granting CalTrans the right to construct stations and parking facilities at six additional locations and ordering SP to operate the commuter service, thus confirming Commissioner Gravelle's oral directive given at the conclusion of the proceedings of October 17.⁷

On October 8, 1982, SP filed with this Court a petition for writ of review and other relief and a motion for temporary stay (No. S.F. 24476), seeking review of and a stay of the October 6, 1982 order. On October 12, 1982, the motion for temporary stay was denied.

On October 14, 1982 SP filed in S.F. 24476 its Amended Petition for Extraordinary Relief (Prohibition) asking the Court to restrain the Commission from enforcing any of its orders issued to SP on or after May 11, 1982 when the ICC assumed jurisdiction over California intrastate rail transportation.

On October 26, SP filed with the Commission its application for rehearing of the October 6 and October 18 decisions. On November 18, 1982 SP filed with this Court its further motion for stay of the enforcement of both orders.

On December 15, 1982, the Commission denied the application for rehearing (Decision No. 82-12-093). On December 23, 1982, this Court denied SP's further motion for stay.

⁷ The complaint in the contempt proceeding was dismissed by Decision No. 82-11-032, effective December 3, 1982. However, the Commission continued to conduct proceedings in that case thereafter.

Related Proceedings

California Supreme Court. In connection with proceedings in Case No. 10575 prior to May 11, 1982 when the ICC assumed exclusive jurisdiction over California intrastate rail transportation, SP on two occasions sought a writ of review of Commission orders. These petitions were not directed to any order issued in Case No. 82-08-01 and did not raise, and could not have been raised, the questions presented by this petition.

On October 3, 1980, in S.F. 24220, SP petitioned this Court for a writ to review Decision No. 91847 as modified by Decision No. 92230. The grounds of the petition were that (a) the Commission acted beyond its jurisdiction under State law in ordering SP to provide a passenger service which SP had not dedicated itself to provide, and (2) the Commission unlawfully failed to consider the availability of alternative bus service with the advantages of lower cost, greater fuel efficiency and flexibility of service.

On July 16, 1981, in No. S.F. 24316, SP sought review of Decision No. 92862 which denied the motions of SP and Greyhound to reconsider the need for the proposed service and to dismiss the proceeding in view of the withdrawal of the County of Los Angeles as a complainant and of Decision No. 92863 which ordered the commencement of commuter service. When that petition was filed, the order to begin operations had been stayed by Decision No. 93118 of May 11, 1981. Such stay remained in effect until June 2, 1982.

The petition in S.F. 24316 did not raise, and could not have raised, the issue of federal preemption because the ICC had not then assumed jurisdiction over California intrastate rail transportation, and the order to commence service had not become final.

Similarly, neither petition could have raised the issue of the taking of SP's property by the Commission for the benefit of CalTrans as the orders of October 6, 1982 and October 18, 1982 permitting CalTrans to construct stations and parking lots had not then been issued.

By minute order of December 23, 1981, this Court denied without comment the two petitions for review in S.F. 24220 and S.F. 24316.⁸

Federal Courts. Following the lifting of the stay by decision No 82-06-045 of June 2, 1982, SP promptly raised the issue of congressional preemption in federal court in an action for injunctive relief filed June 15, 1982.⁹ This was the first opportunity SP had to raise this issue after the ICC had assumed jurisdiction over California intrastate rail service on May 11, 1982 and the Commission had lifted its stay of the order requiring the construction of station and parking facilities and the operation of trains.

In the mistaken belief that this Court's denial of the previous petitions was res judicata of the issue of the Commission's jurisdiction, the district court on August 9, 1982 denied the motion for preliminary injunction and granted summary judgment for the Commission. The issue of federal preemption is now on appeal to the Court of Appeals for the Ninth Circuit. The question of taking of SP's property did not arise until the order of October 6, 1982 and therefore is not pending in any other court.

WHEREFORE, SP requests the Court to issue its writ of review with respect to the Commission's Decision No. 82-10-031 and Decision No. 82-10-041, and upon such review to determine that, in ordering SP to provide intrastate rail transportation service and in granting CalTrans the right to enter and occupy SP's property, the Commission has acted in excess of its authority contrary to the Constitution of the United States, the Constitution of the State of California, and the Eminent Domain Law of this state. The Court is further requested to

⁸ 30 Cal.3d (Adv.) No. 2, Minutes, p. 3.

⁹ *Southern Pacific Transportation Company v. Public Utilities Commission* (U.S.D.C. N.D. Cal. No. C82-3074 MHP).

annul the decisions and restrain the Commission from further asserting jurisdiction over SP's intrastate rail transportation operations.

Executed at San Francisco, California this 14th day of January, 1983.

MALCOLM T. DUNGAN
ROBERT N. LOWRY
MELINDA S. COLLINS
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One Market Plaza
San Francisco, California 94105

HERBERT A. WATERMAN
JOHN MACDONALD SMITH
CAROL A. HARRIS
813 Southern Pacific
Building
One Market Plaza
San Francisco, California
94105

By ROBERT N. LOWRY
Attorneys for Petitioner
Southern Pacific
Transportation Company

VERIFICATION

I, D. M. Mohan, am Vice President—Maintenance, of Southern Pacific Transportation Company, Petitioner in the above-entitled matter. I have read the foregoing Petition for Writ of Review and know the contents thereof; and I certify that the same is true of my own knowledge, except as to those matters which are therein stated on information or belief, and as to those matters I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at San Francisco, California, this 13th day of January, 1983.

D. M. MOHAN

D. M. Mohan

IN THE
SUPREME COURT OF THE
STATE OF CALIFORNIA

SOUTHERN PACIFIC TRANSPORTATION
COMPANY, a corporation; DENMAN K.
MCNEAR, and individual; and WILLIAM
S. WEBER, an individual,

Petitioners,

v.

No. S.F. 24573

PUBLIC UTILITIES COMMISSION OF THE
STATE OF CALIFORNIA AND THE INDIVID-
UAL MEMBERS THEREOF,

Respondents.

PETITION FOR WRIT OF REVIEW
WITH
MEMORANDUM OF POINTS AND AUTHORITIES IN
SUPPORT THEREOF

TO THE HONORABLE ROSE E. BIRD, CHIEF JUSTICE,
AND TO THE HONORABLE ASSOCIATE JUSTICES OF
THE SUPREME COURT OF THE STATE OF
CALIFORNIA:

Southern Pacific Transportation Company ("SP"), Den-
man K. McNear ("McNear") and William S. Weber ("We-
ber") respectfully request this Court to inquire into and deter-
mine the lawfulness of Decision No. 83-02-079, dated February
17, 1983, of the Public Utilities Commission of the State of
California ("Commission"), as modified by Decision No. 83-
05-037, dated May 4, 1983.¹

¹ Decision No. 83-02-079 is Appendix A hereto; Decision No. 83-05-037
is Appendix B hereto.

The foregoing decisions were issued in Case No. 82-08-01 following contempt proceedings instituted against SP and some of its officers by the Commission in Decision No. 83-02-038, dated February 11, 1983.²

SP, McNear and Weber seek review of Decision No. 83-02-079 because, by it, the Commission has purported to assert authority over California intrastate rail transportation which Congress has expressly taken away, and has unlawfully held SP, McNear and Weber in contempt of the Commission for attempting to exercise rights and privileges conferred under federal law. As more fully described below, the issue of the Commission's jurisdiction to regulate intrastate rail service is before this Court in No. SF 24525, but has not yet been determined by this Court in that or any other proceeding.

Jurisdiction of the Court

This petition is filed pursuant to the jurisdiction of the Court to review the decisions of the Commission under §§1756-1767 of the Public Utilities Code. On March 18, 1983, SP, McNear and Weber filed their application for rehearing of Decision No. 83-02-079.³ By Decision No. 83-05-037 of May 4, 1983, the Commission denied the application.

Grounds for Petition

SP, McNear and Weber seek review of Decision No. 83-02-079 of the Commission as modified by Decision No. 83-05-037 on the following grounds:

By ordering SP to continue operating passenger trains between Oxnard and Los Angeles until further order of the Commission, the Commission purported to exercise an authority which the Congress has expressly taken away by

² Decision No. 83-02-038 is Appendix C hereto.

³ SP's Application for Rehearing is Appendix D hereto. It adopts and incorporates by reference the jurisdictional arguments contained in "Special Appearance of Southern Pacific Transportation Company and Response to 'Notice of Motions for Orders of Clarification and Implementation.'" The Special Appearance is Appendix E hereto.

the enactment of the Staggars Act⁴ and which the Interstate Commerce Commission ("ICC") has expressly assumed by accepting SP's tariff which defines and governs SP's holding out to operate the trains ("the ICC Tariff"). The making of such order is in excess of the Commission's authority, contravenes the Supremacy Clause of the federal Constitution, and is in defiance of the ICC's exclusive jurisdiction over California intrastate rail transportation.

By adjudging SP, McNear and Weber in contempt for suspending the passenger trains pursuant to the ICC Tariff, the Commission has unlawfully interfered with petitioners' attempt to exercise federal rights and privileges.

Questions Presented

The Commission's Decision No. 83-02-079 as modified by its Decision No. 83-05-037 presents the following questions for review by this Court:

1. Does the Commission, on and after the assumption by the ICC of jurisdiction over California intrastate rail transportation pursuant to the Staggars Act, have jurisdiction and authority to require SP to continue performing intrastate rail passenger service which SP seeks to suspend in accordance with its lawfully filed ICC Tariff?
2. Can the Commission impose penalties against SP, McNear and Weber for attempting to fulfill obligations imposed by federal law?

Statement of the Case

The order of which review is sought arises out of Commission proceedings which resulted in orders directing SP to operate four week-day passenger trains between Oxnard and Los Angeles for the complainant, Department of Transportation ("Caltrans"). When SP suspended the trains in

⁴ The Staggars Rail Act of 1980, P.L. 96-448, 94 Stat. 1895 (the "Staggars Act"), was passed by Congress October 1, 1980, was approved October 14, 1980 and was made effective as of October 1, 1980.

accordance with a provision in its tariff lawfully on file with the ICC giving SP the right to suspend service for nonpayment of tariff charges, SP, McNear, and Weber were held in contempt of the Commission and fined. SP was ordered to continue operating the trains until further order of the Commission authorizing the suspension of such operations.

The original proceeding was instituted on May 18, 1978 by complaint filed by the County of Los Angeles and CalTrans seeking an order directing SP to establish commuter rail service between Oxnard and Los Angeles, subsidized by the County and Caltrans.⁵ While that proceeding was pending, Congress enacted the Staggers Rail Act of 1980.

The Commission did not become certified by the Interstate Commerce Commission ("ICC") to regulate California intrastate rail rates (including passenger fares) in accordance with federal standards, as required by Staggers. As a consequence, on May 11, 1982, the ICC assumed exclusive jurisdiction to regulate all intrastate rail transportation within California pursuant to 49 U.S.C. §11501(b)(4).⁶ As a result of that assumption, the Commission lost its authority under the police power of the State to require the performance of intrastate rail transportation by carriers subject to the ICC's jurisdiction, such as SP, 49 U.S.C. §10501(c)(1). Thus, on June 2, 1982, when the Commission ordered SP to begin building the commuter stations and parking lots and to file a tariff with the Commission, the subject transportation was under the exclusive regulatory jurisdiction of the ICC (Decision No. 82-06-045).

SP was and is challenging the Commission's order of June 2, 1982 in federal court. To the extent that SP was compelled to participate in Commission proceedings following the ICC's assumption of jurisdiction on May 11, 1982, SP strenuously protested the Commission's lack of subject matter jurisdiction.

⁵ *County of Los Angeles, Department of Transportation v. Southern Pacific Transportation Company*, Case No. 10575. The motion of County to withdraw from the case was granted on April 7, 1981. As a consequence, the entire responsibility for subsidizing the commuter train service fell to Caltrans.

⁶ Ex Parte No. 388, State Intrastate Rail Rate Authority—P.L. 96-448, 365 I.C.C. 700 (May 4, 1982), 47 Fed. Reg. 20220 (May 11, 1982).

The second proceeding arose from a complaint filed August 4, 1982, by Caltrans asking the Commission to institute contempt proceedings against SP for its alleged failure to construct stations and file with the Commission its tariff so that the commuter trains would begin operating on the date specified by Caltrans.⁷

Hearings were held on the contempt complaint on September 27 and 29, 1982, culminating in further orders against SP, directing SP to begin operating the commuter trains on the morning of October 18, 1982.⁸ SP complied under threat of contempt hearings scheduled for 10:00 A.M. on October 18, 1982.

Although the commuter service was instituted pursuant to invalid Commission orders, once instituted, it became transportation subject to the jurisdiction of the ICC. Under 49 U.S.C. §10762(a)(1), rates and charges for such service must be published in a tariff filed with the ICC.⁹

Accordingly, on November 2, 1982, SP filed with the ICC its tariff, with an effective date of December 2, 1982, naming charges payable by Caltrans as the agency which ordered the service. The ICC Tariff also set forth the terms and conditions under which SP will provide special transportation services and includes a provision permitting SP to suspend operation of the service in the event Caltrans did not pay SP in accordance with the tariff and as required by 49 U.S.C. §11905.

Special permission from the ICC required before the tariff could even be accepted for filing, subject to protest and possible suspension and investigation. The Special Permission Board of the ICC granted SP permission to file the tariff over the vigorous objection of Caltrans. Caltrans next filed a protest

⁷ *Department of Transportation v. Southern Pacific Transportation Company*, Case No. 82-08-01.

⁸ Decision No. 82-10-031, dated October 6, 1982 and Decision No. 82-10-041, dated October 18, 1982. Both decisions are before the Court in S.F. 24525.

⁹ § 10762(a)(1) provides: "A carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title (except a motor common carrier) shall publish and file with the Commission tariffs containing the rates and (A) if a common carrier, classifications, rules, and practices related to those rates"

against the tariff with the ICC Board of Suspension, urging that it be rejected, or suspended and investigated. When the Board declined to suspend or investigate, Caltrans appealed to Division 1 of the ICC, but Division 1 allowed the tariff to take effect December 2, 1982. Caltrans then petitioned for reconsideration of the appellate division action, but Division 1 held that its earlier vote was not to reject or suspend or investigate the tariff.¹⁰

In its various protests and appeals before the ICC, Caltrans challenged the ICC's jurisdiction over the intrastate passenger service and also assailed the level of the charges and the rule permitting suspension of service for nonpayment. The ICC's refusal to reject or suspend the tariff is an express affirmation of its jurisdiction over the service and an implicit rejection of Caltrans' contentions that the tariff was unlawful.

By the end of January 1983, Caltrans owed SP more than \$2 million under the ICC Tariff. Although SP had provided and Caltrans had received the services described in the ICC Tariff since October 18, 1982, Caltrans steadfastly refused to pay these tariff charges. As permitted by the tariff and required by law, SP notified the public that train service would be temporarily suspended, commencing February 7, 1983, and continuing until Caltrans paid SP monies due under the tariff. Had SP continued to render transportation services for less than the tariff rate, it would have been in violation of 49 U.S.C. §10761 and would have been subject to civil and criminal penalties prescribed by §§11903(a) and 11905.¹¹

After notifying the public as described above, SP suspended the trains on February 7 and 8, 1983, pursuant to the ICC Tariff permitting such action for nonpayment of charges.

On February 7, 1983, the United States District Court for the Northern District of California issued a temporary restraining order directing that the trains operate at least until Friday, February 18, 1983, when the court would consider the request

¹⁰ Division 1's decision, served January 21, 1983, is Appendix F.

¹¹ § 11903(a) provides for a fine of up to \$20,000 and imprisonment for up to two years; § 11905 provides for a fine of up to \$2,000 per offense per day.

of the County of Ventura and others that a preliminary injunction be entered directing the continued operation of the trains.¹²

On February 11, 1983, the Commission, in Decision No. 83-02-038, directed SP to appear at a hearing to show cause why SP, McNear, or other officers of SP should not be held in contempt for violation of the order directing SP to operate the commuter service (Decision No. 82-10-041).

The Order to Show Cause was issued by the Commission on its own motion and was, notably, not at the instigation of Caltrans on whose behalf the service was being operated. In fact, Caltrans appeared at the contempt hearing on February 15, 1983, and advised the Commission that due to funding and equipment difficulties, the continued operation of the trains was problematic and might not be in the public interest.

SP entered a special appearance at the hearing and defended against the Order to Show Cause as being in excess of the Commission's jurisdiction. SP also introduced evidence establishing that the attempted suspension was in compliance with its ICC Tariff and that its officers had acted on the advice of counsel. Weber appeared and identified himself as being one of the SP officials who had effectuated the suspension.

On February 17, 1983, the Commission held SP, McNear, and Weber in contempt and fined them \$2,000 for each train not operated, for a total fine of \$16,000 (Decision No. 83-02-079). In the contempt order, the Commission took the position that SP was barred from raising the Commission's lack of jurisdiction because SP had not appealed the denial by this Court of a previous petition for writ of review in which those arguments allegedly were or could have been raised. The Commission pointedly warned SP that any further attempts by SP to suspend the trains without Commission approval would be met with additional contempt actions by the Commission.

On May 4, 1983, the Commission recomputed the amount of the fine payable, reduced it to \$1,000, and denied rehearing (Decision No. 83-05-037).

¹² *County of Ventura v. SP* (U.S.D.C. N.D. Cal. No. C83-0581 MPH). On February 22, 1983 at the hearing on the motion for preliminary injunction, the TRO was dissolved and the case was dismissed.

Related Proceedings

California Supreme Court. Prior to May 11, 1982 when the ICC assumed exclusive jurisdiction over California intrastate rail transportation, SP on two occasions sought a writ of review of Commission orders in Case No. 10575. These petitions were not directed to any order in Case No. 82-08-01 and did not raise, and could not have raised, the questions presented by this petition.

On October 3, 1980, in S.F. 24220, SP petitioned this Court for a writ to review Decision No. 91847 as modified by Decision No. 92230. The grounds of the petition were that (1) the Commission acted beyond its jurisdiction under State law in ordering SP to provide a passenger service which SP had not dedicated itself to provide, and (2) the Commission unlawfully failed to consider the availability of alternative bus service with the advantages of lower cost, greater fuel efficiency and flexibility of service.

On July 16, 1981, in S.F. 24316, SP sought review of Decision No. 92862 which denied the motions of SP and Greyhound to reconsider the need for the proposed service and to dismiss the proceeding in view of the withdrawal of the County of Los Angeles as a complainant and of Decision No. 92863 which ordered the commencement of commuter service. When that petition was filed, the order to begin operations had been stayed by Decision No. 93118 of May 11, 1981. Such stay remained in effect until June 2, 1982.

The petition in S.F. 24316 did not raise, and could not have raised, the issue of federal preemption because the ICC had not then assumed jurisdiction over California intrastate rail transportation, and the order to commence service had not become final.

By minute order of December 23, 1981, this Court denied without comment the two petitions for review in S.F. 24220 and S.F. 24316.¹³

¹³ 30 Cal.3d (Adv.) No. 2, Minutes, p. 3.

On October 13, 1983, in S.F. 24476, SP sought a writ of prohibition restraining the Commission from enforcing its orders to institute and operate intrastate passenger service.

Oxnard and Los Angeles (Decision Nos. 82-10-031 and 82-10-041) on the grounds that the orders were in excess of jurisdiction. The Court treated the petition as one for a writ of review and denied it on January 19, 1983, citing Public Utilities Code Section 1731, which makes the filing of an application for rehearing with the Commission a condition of this Court's jurisdiction to consider a petition for writ of review. Since no application for rehearing had preceded the petition in S.F. 24476, it was denied on procedural grounds.

On January 14, 1983, in S.F. 24525, SP again petitioned this Court to review Decision Nos. 82-10-031 and 82-10-041 following denial of its application for rehearing. The grounds of the petition are that (1) the Commission acted beyond its jurisdiction in violation of the Supremacy Clause of the U.S. Constitution by attempting to exercise an authority over intrastate rail transportation taken away in the Staggers Act, and (2) the Commission authorized Caltrans to enter onto and occupy SP's property without compensation in violation of the Fifth and Fourteenth Amendments of the U.S. Constitution, the California Constitution, and the Eminent Domain Law of the State. This petition remains pending before the Court.

Federal Courts. Following the order of June 2, 1982, directing SP to build commuter stations and to file its tariff with the Commission, SP promptly raised the issue of congressional preemption in federal court in an action for injunctive relief filed June 15, 1982.¹⁴ This was the first opportunity SP had to raise this issue after the ICC had assumed jurisdiction over California intrastate rail service on May 11, 1982.

In the mistaken belief that this Court's denial of the previous petitions was res judicata of the issue of the Commission's jurisdiction, the District Court on August 9, 1982, denied the motion for preliminary injunction and granted summary judgment for the Commission. The issue of federal preemption is now on appeal to the Court of Appeals for the Ninth Circuit. Oral argument was heard on April 11, 1983.

¹⁴ *Southern Pacific Transportation Company v. Public Utilities Commission* (U.S.D.C. N.D. Cal. No. C82-3074 MHP).

WHEREFORE, SP requests the Court to issue its writ of review with respect to the Commission's Decision No. 83-02-079, as modified by its Decision No. 83-05-037, and upon such review to determine that, in ordering SP to continue to provide intrastate rail transportation service and in holding SP, McNear and Weber in contempt for exercising rights under federal law, the Commission has acted in excess of its authority contrary to the Constitution of the United States. The Court is further requested to annul the decision and restrain the Commission from further asserting jurisdiction over SP's intrastate rail transportation operations.

Executed at San Francisco, California this 2nd day of June, 1983.

WILLIAM R. DENTON
JOHN MACDONALD SMITH
CAROL A. HARRIS
840 Southern Pacific Building
One Market Plaza
San Francisco, CA 94105
Telephone: (415) 541-1779

By CAROL A. HARRIS
Carol A. Harris
Attorneys for Petitioners

VERIFICATION

I, D. K. McNear, am Chairman and Chief Executive Officer of Southern Pacific Transportation Company and am a petitioner in the above-entitled matter. I have read the foregoing Petition for Writ of Review and know the contents thereof; and I certify that the same is true of my own knowledge, except as to those matters which are therein stated on information or belief, and as to those matters I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct. Executed at San Francisco, California, this 1st day of June, 1983.

D. K. McNear

D. K. McNear

VERIFICATION

I, W. S. Weber, am Assistant to Vice President—Government Relations of Southern Pacific Transportation Company and am a petitioner in the above-entitled matter. This verification is made on behalf of Southern Pacific Transportation Company and also on behalf of myself, as an individual petitioner. I have read the foregoing Petition for Writ of Review and know the contents thereof; and I certify that the same is true of my own knowledge, except as to those matters which are therein stated on information or belief, and as to those matters I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct. Executed at San Francisco, California, this 1st day of June, 1983.

W. S. WEBER

W. S. Weber

ADDRESS ALL COMMUNICATIONS
TO THE COMMISSION
CALIFORNIA STATE BUILDING
SAN FRANCISCO, CALIFORNIA 94102
TELEPHONE (415) 557-0470

PUBLIC UTILITIES COMMISSION

STATE OF CALIFORNIA

FILE NO.

March 4, 1982

Chairman Reese H. Taylor, Jr.
Interstate Commerce Commission, Room 3219
Twelfth St. & Constitution Ave. N. W.
Washington, D.C. 20423

Dear Chairman Taylor:

RE: Ex Parte No. 388, State Intrastate Rail Rate Authority

As you may know, we are contesting the constitutionality of Section 214 of the Staggers Act in *State of Texas and Railroad Commission of Texas, et al. v. United States of America and Interstate Commerce*, Civil No. A-80-CA-487 (D.C. Tex.). Because that case is still pending, California has chosen not to comply with Section 214 and become certified. This lack of certification should not be interpreted as supporting the deregulation of intrastate freight rates. On the contrary, we want intrastate freight rates to continue to be regulated.

The issue to be resolved in the Texas suit is whether federal law or state law should control the regulation of intrastate freight rates. During the time this issue is pending before the Court, we anticipate that the ICC will not allow there to be any break in the regulation of intrastate freight carriers.

We believe that this letter complies with the request of the ICC in its decision served February 8, 1982 in Ex Parte No. 388.

Very truly yours,

JOSEPH E. BODOVITZ

Joseph E. Bodovitz
Executive Director

ADDRESS ALL COMMUNICATIONS
TO THE COMMISSION
CALIFORNIA STATE BUILDING
SAN FRANCISCO, CALIFORNIA 94102
TELEPHONE (415) 557-0470

PUBLIC UTILITIES COMMISSION

STATE OF CALIFORNIA

FILE NO.

March 10, 1982

Chairman Reese H. Taylor, Jr.
Interstate Commerce Commission, Room 3219
Twelfth Street & Constitution Ave., N. W.
Washington, D.C. 20423

Dear Chairman Taylor:

Re: Ex Parte No. 388, State Interstate
Rail Rate Authority

The California Public Utilities Commission (CPUC) in compliance with Ex Parte No. 388 recently notified the Interstate Commerce Commission (ICC) in a letter dated March 4, 1982 that the CPUC anticipated "that the ICC will not allow there to be any break in the regulation of intrastate freight carriers." The CPUC meant this statement to be a request that the ICC assume jurisdiction under the Staggers Act over the intrastate freight rates only pending the outcome of *State of Texas & Railroad Commission of Texas, et al. v. United States of America & Interstate Commerce*, Civil No. A-80-CA-487 (P.O. Tex.). If the ICC does not regard the CPUC March 4, 1982 letter as such a request, please regard this letter as such.

Sincerely,

JANICE B. KERR

Janice B. Kerr
General Counsel